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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1984

Case No. 84-1047

LOUIE L. WAINWRIGHT, Secretary
Department of Corrections
State of Florida

Petitioner,

vs.

DENNIS WAYNE SMITH

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF PETITIONER ON JURISDICTION

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18 pp

QUESTIONS PRESENTED

1. Whether counsel's representation fell below the performance standard required by this Court in Strickland v. Washington, ___U.S.___, 80 L.Ed.2d 674 (1984), where counsel's cross-examination, although adequate, did not include all sources of impeachment evidence.

2. Assuming counsel's performance was deficient, does prejudice result from the failure to use a pretrial statement for purposes of impeachment where the record as a whole demonstrates that counsel effectively attacked the witnesses' credibility using other sources of impeachment evidence.

3. Whether the Court of Appeals failed to properly apply, pursuant to 28 U.S.C. §2254(d), the factual findings made by the state trial court after a full and fair hearing regarding an alleged

violation of Brady v. Maryland, 373 U.S. 83 (1963).

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REASONS FOR GRANTING THE WRIT

1. WHETHER COUNSEL'S REPRESENTATION FELL BELOW THE PERFORMANCE STANDARD REQUIRED BY THIS COURT IN STRICKLAND V. WASHINGTON, ___U.S.___, 80 L.Ed.2d 674 (1984), WHERE COUNSEL'S CROSS-EXAMINATION, ALTHOUGH ADEQUATE, DID NOT INCLUDE ALL SOURCES OF IMPEACHMENT EVIDENCE.

Respondent has restated the first issue of the petition as follows:

> Where no "reasonable trial strategy" appears from the face of the record to explain trial counsel's failure to use prior inconsistent statements in impeaching the testimony of the State's critical witnesses, the Circuit Court of Appeals' remand for an evidentiary hearing on the issue does not create conflict with the standards for judging an ineffectiveness of counsel claim enunciated in Strickland v. Washington, ___ U.S.___, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Respondent's claim that Smith waived his right to closing argument by "putting on testimony from witness Parks" is in

error. Respondent's Brief on Jurisdiction at 7. Smith testified in his own defense at trial. He was the only witness for the defense and, therefore, did not give up his right to open and close final argument. Smith v. State, 365 So.2d 704, 706 (Fla. 1978).

Respondent's argument that the September 6th statements would have "planted doubt in the minds of the jurors"[1] erroneously assumes that the inconsistency between the two statements was sufficient to cast doubt on Johnson's credibility. On the contrary, the statement of September 6th and the testimony given by Johnson at trial was not so inconsistent as to render Johnson's trial testimony unbelievable. Although Johnsons's earlier statement made no

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1 Respondent's Brief on Jurisdiction at 7.

reference to Smith, the statement did indicate that a second automobile was present at the scene of the murder. Johnson refused to answer any questions regarding the source of this vehicle or its driver. In subsequent statements made to police Johnson identified Smith as the driver of the second automobile. Thus, contrary to respondent's claim, the September 6th statement was not so inconsistent as to have destroyed Johnson's credibility as a witness.

Finally, respondent submits that review of this issue is not "ripe" because the Court of Appeals did not rule that counsel was ineffective, but simply remanded for an evidentiary hearing to determine whether failure to use the statements for impeachment was prompted by reasonable trial strategy. Respondent's Brief on Jurisdiction at 8. Where

counsel's trial strategy is apparent from the record, an evidentiary hearing is not required. Under the circumstances of this case, an evidentiary hearing on the issue of counsel's trial strategy is directly contrary to the principles announced by this Court in Strickland.

In Strickland, the District Court held an evidentiary hearing to inquire into trial counsel's efforts to investigate and to present mitigating circumstances. This Court reasoned that the state courts properly concluded that the ineffectiveness claim was meritless without holding an evidentiary hearing. 80 L.Ed.2d at 702. As in Strickland, the ineffectiveness claim in this case is capable of resolution based on the record before the district court. No evidentiary hearing is necessary.

This Court held in Strickland that a

court must indulge a strong presumption that the challenged conduct constitutes reasonable trial strategy. 80 L.Ed.2d at 694-695. The record in this case is clear that counsel's strategy during trial was to attack Johnson's credibility primarily on the basis of his plea bargain with the state. Counsel made this point during his cross-examination, together with the fact that Johnson had taken sole responsibility for the crime on another occasion.[2] Simply because other lawyers might have proceeded differently is not enough to render the assistance ineffective. Respondent has failed to rebut the Strickland presumption that counsel's actions were reasonable trial strategy.

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2 While in jail awaiting trial, Johnson wrote a note to Smith which states that "I made sure he heard me talking about how I done it by myself..." This note indicates that Johnson confessed to another inmate Parks so that Smith could call Parks at trial to impeach Johnson.

2. ASSUMING COUNSEL'S PERFORMANCE WAS DEFICIENT, DOES PREJUDICE RESULT FROM THE FAILURE TO USE A PRETRIAL STATEMENT FOR PURPOSES OF IMPEACHMENT WHERE THE RECORD AS A WHOLE DEMONSTRATES THAT COUNSEL EFFECTIVELY ATTACKED THE WITNESSES' CREDIBILITY USING OTHER SOURCES OF IMPEACHMENT EVIDENCE.

Respondent has restated the second issue of the petition as follows:

> Assuming trial counsel's performance is in fact deficient, the Strickland "prejudice" standard is met by a showing that the evidence which counsel failed to use consisted of the earliest record statements to the police by the crucial witnesses against respondent, in which the witnesses failed to make any mention whatsoever of respondent's participation in the offense.

Respondent's claim that the Johnsons initial statements to police would have "carried substantial weight with a jury of laymen" misses the mark. The question, as

posed by this Court in Strickland is whether the attorney error undermines confidence in the outcome or renders the results of the proceeding unreliable.

In making the determination whether the specified error or omission resulted in the required prejudice, a court must consider the "totality of the evidence" before the judge or jury. Strickland at 698. As noted by this Court, some factual findings will be unaffected by the error and others will not. The purpose of the prejudice inquiry is to determine whether "the decision reached would reasonably likely have been different absent the errors." Id at 699.

In addition to the direct evidence of guilt provided by Johnson's testimony there was considerable circumstantial evidence against Smith. It included testimony of observers at the second bar,

which fit Johnson's story of what happened there better than Smith's. Further, Smith was linked to the scene of the crime by expert opinion that tire tracks found there were unquestionably from his car. The same expert testified that tennis shoes found at the scene could have been made by Smith's tennis shoes. Smith v. State, supra at 706.

Trial counsel effectively challenged the credibility of Patricia and Wesley Johnson through competent impeachment evidence. Failure to use the September 6th statements as further evidence of impeachment did not render the results of the trial unreliable. Given the totality of the evidence presented to the jury, the decision reached would not in all likelihood have been different absent the omission.

3. WHETHER THE COURT OF APPEALS FAILED TO PROPERLY APPLY, PURSUANT TO 28 U.S.C. §2254(d), THE FACTUAL FINDINGS MADE BY THE STATE TRIAL COURT AFTER A FULL AND FAIR HEARING REGARDING AN ALLEGED VIOLATION OF BRADY V. MARYLAND, 373 U.S. 83 (1963).

Respondent has restated the third and final issue of the petition as follows:

> In shaping a pragmatic remedy to avoid a patent injustice to respondent if a certain unique factual finding should be made by the district court on remand for evidentiary hearing, the Circuit Court of Appeals does not fail to give proper weight to the "presumption of correctness" normally given to a state court hearing.

By permitting the District Court to reopen the Brady issue, the Court of Appeals has effectively circumvented the policy underlying 28 U.S.C. §2254(d) and Sumner v. Mata, 449 U.S. 539 (1981).

In a series of cases this Court has

recognized the valid interests in promoting policies which insure that at some point in time there will be an end to litigation and that federal appellate court fact-finding is not superior to that of the state courts. Sumner v. Mata, supra at 550 fn. 3; Smith v. Phillips, 455 U.S. 209 (1982); Marshall v. Lomberger, 451 U.S. 422 (1982); Maggio v. Fulford, ___U.S.___, 76 L.Ed.2d 794 (1983); Wainwright v. Goode, ___U.S.___, 78 L.Ed.2d 187 (1983); Patton v. Yount, __ U.S.___, 81 L.Ed.2d 847 (1984). The approach adopted by the Court of Appeals expands the number of unnecessary evidentiary hearings in the Federal District Court and further exacerbates the tension between state and federal judicial systems.

Because the decision of the Court of Appeals constitutes a departure from

Sumner v. Mata and §2254(d), the petition should be granted and summary reversal is appropriate.

CONCLUSION

For the reasons set forth in this brief as well as the initial brief, petitioner respectfully urges this Court to grant Certiorari and reverse the decision of the Court of Appeals in and for the Eleventh Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Theda James Davis, Counsel for Petitioner, and a member of the Bar of the United States, hereby certify that on the 27th day of February, 1985, I served three copies of the Reply Brief of Petitioner by U.S. Regular Mail to Sandra Goldenfarb, Esq., 631 Chestnut Street, Clearwater, FL 33516-5379 and Patrick D. Doherty, Esq., 619 Turner Street, Clearwater, FL 33516.

Theda James Davis
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